Signed

No. 623.

Brief of Gov for P. E.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

GEORGE THOMPSON, Plaintiff in Error, vs. THE STATE OF MISSOURI, Defendant in Error.	}	No. 623.

Statement and Brief for Plaintiff in Error.

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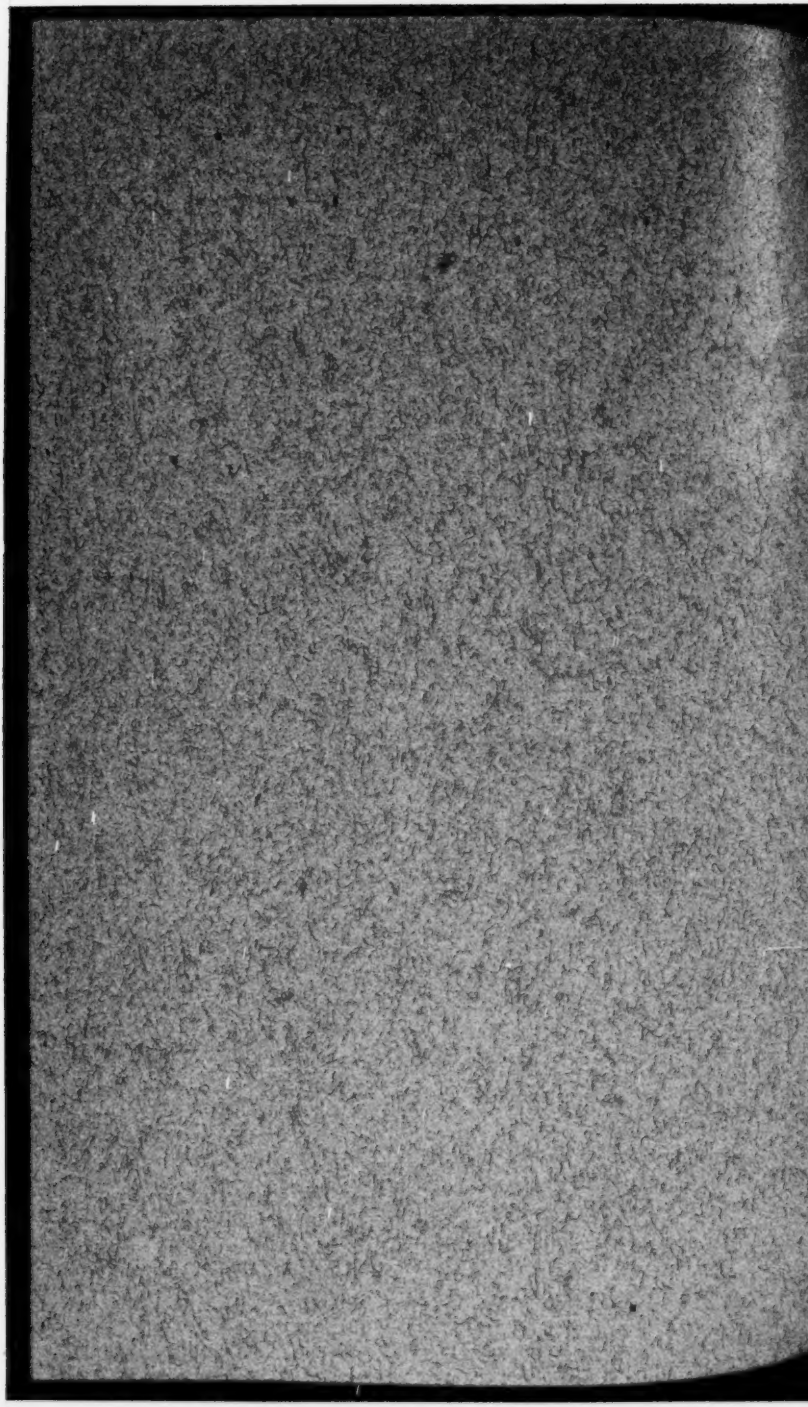

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STATEMENT.

At the November Term, 1894, of the St. Louis Criminal Court, an indictment was returned against defendant, charging him with murder in the first degree It was filed in said Court, November 24, 1894. On December 6, 1894, defendant was arraigned and pleaded not guilty. The cause came on for hearing March 22, 1895, and on March 27th, the jury returned a verdict, finding defendant guilty as

charged. The defendant, after having been sentenced in accordance with said verdict, was granted an appeal to the Supreme Court of Missouri. and on February 4, 1896, the case was reversed and remanded. The cause came on for a second hearing May 25, 1896, and was concluded May 29, and on the same said day a verdict was rendered, finding defendant guilty as charged.

Within four days thereafter defendant filed a motion for a new trial, which said motion was, by the Court, overruled on July 21, at the May Term.

On July 23, defendant filed his motion in arrest, which said motion was by the Court overruled on July 27, and, after defendant had been sentenced in accordance therewith, a second appeal was granted to the Supreme Court of Missouri.

On November 16, 1897, the said Supreme Court rendered an opinion, affirming the judgment of the trial Court, Barclay, C. J., and Sherwood, J., dissenting.

In due time a motion for a rehearing was filed, which said motion was by the Court overruled; and, afterwards, to-wit, on January 5, 1898, a writ of error was granted to this Court.

The attention of this Court is directed to the introduction of certain handwritings in evidence, under an act of the Legislature changing the law upon this subject, passed after the arrest, indictment and first trial of this defendant.

SUBSTANCE OF EVIDENCE.

The evidence is not here stated, the facts as shown by the record being substantially as follows:

On September 29, 1894, this defendant was arrested on the charge of causing the death of one Joseph Cunningham, by means of strychnine poison, and a conviction is sought upon circumstantial evidence alone. It being essential that the State show that the defendant, or some one for him, had procured or was in possession of the kind of poison alleged to have been administered, and which caused the death of deceased, it was discovered that a quantity of strychnine had been purchased on an order purporting to have been written by a neighboring physician. The druggist who filled the order testified that he knew defendant well, and stated positively that he was not the person who presented the order and obtained the poison thereon. The physician whose name was signed to the order denounced it as a forgery. It was likewise essential in order to secure a conviction, that some motive for the commission of the offense be established on the part of the defendant. Accordingly, an anonymous letter was brought forward, containing an overt threat against the life of deceased, the State claiming that both the papers referred to were written by the same hand. The first

paper being denounced as a forgery, and the second being unsigned, the State attempts to prove that both were written by defendant by means of a comparison with certain extraneous writings, alleged to have been secured from him after his incarceration.

It is admitted that these writings contained nothing whatever against the defendant, or in any wise pertaining to the case. but were sought to be introduced solely for the purpose of comparison with the former writings referred to, to-wit, the forged order for strychnine and the anonymous threatening letter, and by such comparison prove that both were in the handwriting of defendant, thus directly connecting him with the crime with which he stands charged.

At the time of the arrest and first trial of this defendant there was no statute providing for the introduction of such writings for the purposes referred to, and for more than fifty years, the State Supreme Court had followed the common law rule; but, notwithstanding, these writings were, over defendant's objection, admitted for comparison. The case was appealed to the Supreme Court, and because of this error was reversed and remanded.

State vs. Thompson, 132 Mo. 301; 34 S. W. Rep. 31.

Subsequently, the legislature passed an act changing the law upon this subject, which said act is in words and figures as follows: "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writing and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of

genuineness or otherwise of the writing in dispute." Sess. laws Mo. 1895, p. 284. Under this act the same writings were allowed to be introduced for the same purpose for which they had been held to be incompetent at the first trial, and presumably so because on the date of the second trial the act legalizing such evidence had gone into effect. This was not any new or different handwriting obtained from the defendant after that act went into effect but was the same old writing which had been declared incompetent. These writings were admitted over defendant's objection, the conviction now complained of resulted, the case was again appealed and affirmed. 42 S. W. Rep. 949.

ERRORS ASSIGNED.

I.

It was error to admit in evidence for the purpose of comparison certain extraneous handwritings under the provisions of section 8,944A session laws of Missouri, 1895, because the said act was passed after the arrest, indictment and trial of defendant and is in violation of Art. 1, Sec 10, Constitution United States.

Calder vs. Bull. 3 Dall., 386;
Kring vs. Missouri, 107 U. S., 221;
State vs. Bond, 4 Jones (N. C.), 4;
State vs. Johnson, 12 Minn., 386;
Story on the Constitution, Sec. 1,345;
Cooley Const. Lim., pp. 319-325;
1 Blackstone, Sec. 45-46;
Kent's Commentaries, p. 458;
Miller on the Constitution, p. 587;
Hare's Am. Const. Law, p. 565;
Black on Const. Prohibitions, Sec. 234 et seq.

II.

It was error to admit in evidence for the purpose of comparison certain extraneous handwritings under section 8,944A session laws of Missouri, 1895, be-

cause in violation of Art. II, Sec. 15, Constitution of Missouri, and in violation of sections 6594, 6597, 6598, Revised Statutes of Missuori, 1889.

State vs. Thompson, 42 S. W. Rep. (Mo.), p. 953;
Pacific R. R. Co. vs. Cass Co., 53 Mo., 17;
City of St. Louis vs. Life Ass'n., 53 Mo., 466;
State vs. Grant, 79 Mo., 113.

ARGUMENT.

It is contended that the admission of certain extraneous handwriting, under Sec. 8944a. laws of 1895, for the purpose of forming a standard of comparison, and by this means to directly connect the defendant with the crime with which he stands charged, thus rendering a conviction possible, is obnoxious to the constitutional inhibition upon ex post facto laws, and likewise in contravention of the constitution and laws of the State of Missouri, which not only prohibit the passage of ex post facto laws, but of all retrospective legislation. The law ascribes no probative force to any particular testimony offered in a criminal proceeding, the whole testimony being submitted to the jury for its consideration upon proper instructions by the Court. There is, however, cast upon the State the burden of proving the guilt of the accused beyond a reasonable doubt, and if, after the close of it's testimony, it has failed to so establish any material point, it is the duty of the Court to give to the jury a peremptory instruction to acquit the defendant. In this case it is not possible to secure a conviction of the defendant, unless the State is able to connect him in some way with the offense with which he stands charged, and to offer testimony showing a motive for its commission. It is by the admission of

this testimony that the State is enabled to establish these essential elements, and, indeed, it is not necessary to discuss at length the materiality of this testimony, as it has been declared by Division No. 2 of the Supreme Court of Missouri to be so material as to warrant a reversal of the judgment of the lower Court.

State vs. Thompson, 132 Mo. 301.

The question before this Court is, whether testimony declared inadmissible upon the first trial of this cause is properly admitted at a later trial, because of the passage of a statute in the meanwhile, rendering such testimony legal and competent.

Laws 1895, p. 284.

The act does not purport to apply to then pending causes, or to alter or change any of the sections of the statutes cited, and which still remain in force. Yet the trial Court, under it's provisions, admitted in evidence the same writings which had been declared inadmissible upon the first trial. The admission of the evidence, under the act referred to, we believe to be clearly in violation of the provisions of our Federal Constitution, which provides that no ex post facto law shall be passed, and also in violation of the constitution and laws of Missouri, which provide not only against the passage of ex post facto laws, but against all retrospective legislation. Mr. Justice Miller, in Kring vs. Missouri, supra, says: "Every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commmission of the offense, in order to convict the offender, or which renders a

conviction easier, is ex post facto and, therefore, void."

Now, the writings in question were never evidence until the state could prove that the same were in the handwriting of the defendant. That is to say, they were never evidence until proved to be genuine, and the proof of their genuineness is the basis of their admission. Unproved, it is the same as though they had never existed. Hence, it is not changing the means of proving that which was already evidence because this was never legal and competent evidence. Unless the state is able to establish by legal and competent evidence that the alleged order for strychnine and anomynous threatening letter were written by the defendant the same are not and cannot be any evidence whatever against him. It is conceded that under our law at the time of the first trial of this defendant extraneous writings, not in evidence for any other purpose and not admitted to be genuine, could not be introduced for the purpose of comparison only. So under our laws now, hearsay evidence is not admissible, yet if the legislature is empowered to alter the legal rules of evidence with respect to the introduction of handwritings and render that legal and competent which before was illegal and incompetent, why may it not also remove the reasons for the exclusion of hearsay and by such means secure the conviction of any one charged with the commission of a crime? Hearsay is also evidence, but it is excluded for certain reasons; so at the time of the first trial of this defendant extraneous writings were evidence but excluded for certain reasons; hence, neither were legal and competent evidence and, therefore, the same as though they had never

existed. Under our constitution, when an offense is commtited, if there be any rule, however technical, which can by possibility avail the accused, he must retain it to the end and the stumbling block cannot be removed by legislation. Nor has a legislature authority to alter and change laws relating to procedure in its broader sense, because the term procedure may embrace the whole system of pleading, practice and evidence and when we say that the legislature is empowered to alter rules of procedure, we only mean that it has power to alter such matters of procedure as will not prejudice any substantial rights of the accused. Mr. Justice Harlan in Hopt vs. Utah, (110 U. S. 574,) follows all the authorities with respect to the true meaning of ex post facto law as contained in our constitution, holding that the ban may be removed from a certain class of persons as witnesses so long as the rules of evidence, that is to say, rules which relate to the component parts of the evidence as such, are not altered and the situation of the accused changed to his disadvantage. It will be observed that the rule in this case relates solely to the restrictions placed upon a certain class of persons, and not to the evidence itself or a past offense.

In State vs. Johnson, 12 Minn., 378, the court holds that the admission of indirect evidence, is, as to offenses alleged to have been committed prior to the time of its passage ex post facto and void.

In conclusion, if a person be charged with the commission of an offense, which can only be proved by testimony of a particular kind or grade, and afterwards a law abolishing the reasons for the exclusion of that testimony is passed, and that which was theretofore illegal and incompetent testimony is rendered

legal and competent testimony, surely the accused would be just as liable to be unjustly punished as he would be under either of the other meanings of ex post facto law. Had it not been for the prejudicial error thus committed the defendant could not have been convicted.

Respectfully submitted,

MARION C. EARLY,

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